

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
APPENDIX**





77-1030

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

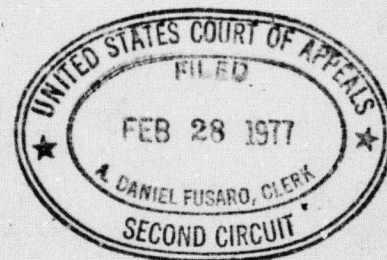
B  
PL

DOCKET NO. 77-1031

UNITED STATES OF AMERICA,  
PLAINTIFF-APPELLEE,  
V.  
ARLO LEWIS,  
DEFENDANT-APPELLANT.

ON APPEAL FROM THE  
UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT

APPENDIX TO BRIEF  
OF APPELLANT ARLO LEWIS



RICHARD S. CRAMER  
ASSISTANT FEDERAL PUBLIC DEFENDER  
450 MAIN STREET  
HARTFORD, CONNECTICUT 06103  
ATTORNEY FOR DEFENDANT-APPELLANT

PAGINATION AS IN ORIGINAL COPY



INDEX TO APPENDIX

	<u>Page</u>
Docket Entries . . . . .	App. 1
Indictment . . . . .	App. 5
Information . . . . .	App. 5a
Superseding Stipulation . . . . .	App. 5b
Ruling on Defendant's Pre-Trial Motions . . . . .	App. 6
Application for Arrest Warrant . . . . .	App. 36

JAN 27 1977

CHARGE NO.	JUDGE/MAGISTRATE Assigned	U.S.
CHARGE NO.	05	2
CHARGE NO.	205	2
CHARGE NO.	2	2

LEWIS, ARLO OFFICE OF THE FEDERAL  
PUBLIC DEFENDER

Case Filed  
Mo. Day  
9 17  
1

MJB

76 97

2

18:2113(a)

bank robbery by force, violence and  
intimidation (ct. #1)

INFORMATION:

18:2113(b)

carry away monies from a federally-  
insured institution

## BAIL • RELEASE

<input type="checkbox"/> AMT	<input type="checkbox"/> Fugitive
<input type="checkbox"/> Denied	<input type="checkbox"/> Pers. Recog.
<input type="checkbox"/> Set	<input type="checkbox"/> PSA
<input type="checkbox"/> \$ 100,000	<input type="checkbox"/> conditions
<input type="checkbox"/> Date	<input type="checkbox"/> 10% Deposit
<input type="checkbox"/> 9/17/76	<input checked="" type="checkbox"/> Surety Bond
<input type="checkbox"/> Bail Not Made	<input type="checkbox"/> Collateral
<input type="checkbox"/> Status Changed (See Docket)	<input type="checkbox"/> 3rd Prty Cust Other

## II. KEY DATES &amp; INTERVALS

ARREST or	INDICTMENT	ARRAIGNMENT	TRIAL
U.S. Custody Began	High Risk Date	1st Plea	Trial Set For
Summons Served	Indict. Waived	9/24/76	10/26/76
First Appearance	Superseding Indict/Info	9/24/76	NG <input checked="" type="checkbox"/> G <input type="checkbox"/> NOL
	In Charging District	12/9/76	G. Plea W/Drawn
		12/9/76	NG <input checked="" type="checkbox"/> G <input type="checkbox"/> NOL

SENTENCE
Disposition of Charges
12/9/76
<input type="checkbox"/> Convicted
<input type="checkbox"/> Acquitted
<input type="checkbox"/> Dismissed
<input type="checkbox"/> On All Charges
<input type="checkbox"/> On Lesser Offense(s)
<input type="checkbox"/> WOP
<input type="checkbox"/> WP
<input type="checkbox"/> On Government's Motion

SEARCH WARRANT	DATE	INITIAL/NO.	INITIAL APPEARANCE DATE	INITIAL/NO.	OUTCOME:
Issued			PRELIMINARY EXAMINATION		<input type="checkbox"/> DISMISSED
Returned			OR		<input type="checkbox"/> HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT
Issued			REMOVAL HEARING		<input type="checkbox"/> HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW
Served			OR		
Arrest Warrant Issued			WAIVED		
COMPLAINT			NOT WAIVED		
OFFENSE (in Complaint)			INTERVENING INDICTMENT		

U.S. Attorney or Asst.

Peter C. Dorsey, U.S. Atty.  
Albert S. Dabrowski, Asst.  
Thomas P. Smith, Asst.

ATTORNEYS

Defense ☐ CJA ☐ Ret ☐ Waived ☐ Self ☐ None / Other ☒ FD ☐ CD

Richard Cramer

BROWN - 1

EXCLUDABLE DELAY

(a) (b) (c) (d)

1976

9/17

Indictment, filed. Bench/Warrant to issued as a  
detrainer. Bond set at \$100,000 full surety.  
(Eagan, Mag.)

9/20

Bench Warrant issued and handed US Marshal.

9/21

Application For Writ of Habeas Corpus Ad Prosequendum  
with Order of Court thereon, filed. (Blumenfeld, J.)  
M:9-21-76. Two attested copies handed US Marshal  
in Hartford.

9/24

Public Defender appointed to represent deft.  
PLEA of not guilty entered to one count. Case  
continued until October 26, 1976 for trial. CJA 23,  
Financial Affidavit, filed. Notice of Readiness,  
filed by Govt. (Eagan, Mag.)

9/30

Notice of Compliance With Local Rule 4 of the Speedy Trial  
Act, filed.

10/8

Suppl. Notice of Compliance With Local Rule 4 of the  
Speedy Trial Act, filed.

10/8

Motions For Discovery and Inspection, To Reveal  
Identity of Informant, To Suppress Eyewitness Identification,  
(Pursuant to F.R.C.P. 41(f) and To

App. 1

BEST COPY AVAILABLE



DATE		Interval (a)	Start Date End Date (b)	Ln Code (c)	Total Days (d)	
10/8	Suppress Statements, filed.					
10/14	Hearing on oral motion for reduction of bond - Denied. (Eagan, Mag.)					
10/15	Magistrate's paper's filed...BRA Form No. 1,2 tapes. (Eagan, Mag.)					
10/15	Govt.'s. Opposition to Deft's. Motion For Discovery and Inspection and Govt.'s Preliminary Memorandum in Opposition to Deft. Arlo Lewis' Motion to Suppress, filed.					
10/21	Marshal's executed return, filed. (Warrant For Arrest of Deft.)					
10/27	Memorandum of Points and Authorities in Support of Pretrial Motions, filed.					
10/29	Motion For Release Under Speedy Trial Act, filed.					
11/2	Memorandum in Support of Motion for Release, filed.					
11/1	Govt's. Opposition to Motion For Release Under The Speedy Trial Act, filed.					
11/2	Second Supplemental Notice of Compliance With Local Rule 4 of The Speedy Trial Act, filed.	2	11/2/76	E		
11/2	Hearing on Motion to Reveal Identity of Informant Withdrawn. Motion to Suppress Eyewitness Identifica- tion & to Suppress Statements - Document provided by Govt. for In Camera review - Order Sealed by Court. Deft. Brown, present at counsel table, advised Court that he does not consent to being transferred to N.Y. re action in that jurisdiction. 5 deft. witnesses sworn & testified. Deft. sworn & testified. Deft. exh. #1 & #4 marked for identification. Deft. exh. #2, 3 & 5, filed. One Govt. witness sworn & testified. Govt. exh. A, B & C, filed. Continued until 11/7/76. Court adjourned at 4:45 p.m. (Blumenfeld, J.)					
11/3	Court Reporter's transcript of Proceedings held on November 2, 1976, filed in Hfd. (Collard, R.)					
11/4	Continued Suppression Hearing - Deft. exh. #6 thru 8A, filed. Govt. witness previously sworn, resumed stand & testified. Two Govt. witnesses sworn & testified. Govt. exh. D thru G, filed. One Deft. witness sworn & testified. Dec. Reserved. Court adjourned at 1:00 p.m. (Blumenfeld, J.)	3	11-4-76	E	2	
11/5	Notice of Witnesses Govt. Intends to Call During its Case-in-Chief, filed.					
11/5	CJA 21 executed (Cramer, F.P.D.) and mailed to A.O. for payment.	3	11-8-76	E		
11/8	Govt's. Memorandum in Support of Opposition to Deft's. Motion For Release Under the Speedy Trial Act, filed.					
11/9	Court Reporter's transcripts of Proceedings held on November 2 and 4, 1976 (2 vols.) filed in Hartford. (Collard, R.)					
11/9	Marshal's executed return, filed. (Appl. For Writ of H.C.)					

## FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER



LEWIS, Arlo

76

Yr.

97

Docket No.

2

Def

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
1976	(Document No.)				
11/11	Motion For One-Day Extension of Filing of Memorandum and Motion For Return of Exhibits, filed.				
11/12	Endorsement entered and filed on Motion For One-Day Extension, "O.K." (Blumenfeld, J.) M.11-12-76. Copies sent to counsel of record.				
11/12	Endorsement entered and filed on Motion For Return of Exhibits, "Motion granted. 11-12-76." (Blumenfeld, J.) M.11-12-76. Copies sent to counsel of record.				
11/12	Court Reporter's transcript of proceedings held on November 12, 1976, filed in Hartford. (Collard, R.)				
11/12	Hearing on Motion For Release - 2 deft. witnesses sworn and testified. Motion denied. (Blumenfeld, J.)	3	11/12/76 11/12/76	E	1
11/15	Memorandum of Law in Support of Motion to Suppress filed.	3		G	
11/15	Receipt from Dora Adams (F.P.D.'s. Office) re return of Deft. Exh. #1, filed.				
11/18	Government's Proposed Findings of Fact and Memorandum In Opposition To Defendant Arlo Lewis' Motions to Suppress, filed.	3	11-18-76	G	
11/19	Court Reporter's transcript of proceedings held on November 12, 1976, filed in Hartford. (Collard, R.)				
12/9	Waiver of Indictment executed and filed. INFORMATION, filed. Intention to Enter a Guilty Plea filed. <del>PLEA</del> of guilty to one count Information, entered. Case continued on same bond for presentence report. Oral Motion of Def. to Suppress, Denied. Re: Def's. Motion to Suppress re Indictment No. H-76-97 and Def's. Motion For Release from Custody, Denied, written opinion to be filed. (Blumenfeld, J.)				
12/10	Court Reporter's notes of Proceedings held on Nov. 2, 1976, filed in Hartford. (Collard, R.)				
12/10	Court Reporter's notes of Proceedings held on Nov. 4, 1976 and November 12, 1976, filed in Hartford. (Collard, R.)				
1977					
1/3	RULING ON DEFENDANT'S PRE-TRIAL MOTIONS, filed. (Blumenfeld, J.) m-1/4/77 Copies sent to Attys. Cramer, Kennedy and Dabrowski. ".....defendant's motion for release from custody, denied - Defendant's motion to suppress statements he made while he was in custody is granted in part and denied in part. The statement made to Special Agent Willis and the statements to Detective Campbell are inadmissible because they were elicited in violation of the procedures outlined in Miranda v. Arizona, supra. The oral and written confession given to Special Agent Miller is fully admissible. It is SO ORDERED."				
1/3	DISPOSITION: three years imprisonment. Indictment H-76-97 dismissed by Court on Mo. of US Atty. (Blumenfeld, J.)				
1/5	Notice of Appeal, filed. Copies sent to counsel.				
1/6	Certified copies of Notice of Appeal and docket entries mailed to USCA.				
			App. 3		



UNITED STATES DISTRICT COURT  
CRIMINAL DOCKET

USA vs. Arlo Lewis  
Criminal H-76-97

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE				LAY			
1977	(Document No.)	(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)
1/5	Judgment and Commitment Order, filed. (Blumenfeld, M.1-6-77. Two attested copies handed US Marshal and one attested copy handed US Probation Officer.	J.)							



UNITED STATES DISTRICT COURT  
HARTFORD, CONN.  
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA :

v. :

CRIMINAL NO. H-76-97

WAYNE BROWN and  
ARLO LEWIS :

I N D I C T M E N T

The Grand Jury charges:

ONE COUNT

On or about July 10, 1976, in the District of Connecticut, WAYNE BROWN and ARLO LEWIS, the defendants, by force and violence and by intimidation, wilfully and unlawfully did take from the person and presence of another, the approximate sum of \$2,147 in money, belonging to and in the care, custody, control, management and possession of the United Bank and Trust Company, Windsor Office, 494 Windsor Avenue, Windsor, Connecticut, the deposits of which were then insured by the Federal Deposit Insurance Corporation, in violation of Title 18, United States Code, Section 2113(a).

A TRUE BILL.

A. Norman Arntsen  
Foreman

Peter C. Dorsey  
PETER C. DORSEY  
United States Attorney

Albert S. Dabrowski  
ALBERT S. DABROWSKI  
Assistant United States Attorney

Thomas P. Smith  
THOMAS P. SMITH



UNITED STATES DISTRICT COURT DEC 8 1976  
DISTRICT OF CONNECTICUT OFFICE OF THE FEDERAL  
PUBLIC DEFENDER

UNITED STATES OF AMERICA :  
v. : CRIMINAL NO. H-76-97  
ARLO LEWIS :

I N F O R M A T I O N

The United States Attorney, through the Assistant  
United States Attorney, charges:

ONE COUNT

On or about July 10, 1976, in the District of  
Connecticut, ARLO LEWIS, the defendant, did take and carry away,  
with intent to steal and purloin, from the United Bank & Trust  
Company, Windsor Office, 494 Windsor Avenue, Windsor, Connecticut,  
a federally-insured institution, the sum of approximately Two  
Thousand One Hundred Forty-seven Dollars (\$2,147) belonging to  
and in the care, custody, control, management and possession of  
said bank, in violation of Title 18, United States Code,  
Section 2113(b).

UNITED STATES OF AMERICA

PETER C. DORSEY  
\_\_\_\_\_  
United States Attorney

ALBERT S. DABROWSKI  
\_\_\_\_\_  
Assistant United States Attorney



UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA

v.

ARLO LEWIS

CRIMINAL NO. H-76-97

SUPERSEDING STIPULATION

It is hereby stipulated by and between the captioned parties, through counsel, that the stipulation previously entered into on November 4, 1976, and entered into evidence as defense exhibit #8 is no longer in effect and is hereby superseded by the following:

1. Prior to obtaining a warrant to arrest the defendant, ARLO LEWIS, Windsor Police Detective Overstrum displayed a spread of seven photographs, one of which was a photograph of ARLO LEWIS, to Mae Johnson and Joseph Lupacchino, two employees of the bank who were present during this robbery; and three customers of the bank who were also present during the robbery: Martin Olesen, Rita Henry and Laurence Novelle;

2. On the evening previous to the robbery Rhoda West, a teller at that bank, saw two young black males who met the general description of the robbers. Max Cohn, who works in a neighboring shop, saw two young black males walking slowly near the bank at approximately the same time as the robbery. Neither Rhoda West nor Max Cohn was inside the bank during the robbery. Prior to obtaining the warrant, Detective Overstrum displayed the same spread of seven photographs to Rhoda West and Max Cohn;

3. With the exception of Joseph Lupacchino, none of the above individuals identified anyone in that spread as being one of the robbers;

4. Joseph Lupacchino identified the photograph of the defendant ARLO LEWIS as depicting one of the robbers;



5. In his affidavit in support of a warrant to arrest ARLO LEWIS, Detective Overstrum indicated that Joseph Lupacchino had identified ARLO LEWIS' photograph;

6. Detective Overstrum did not indicate in that affidavit that Martin Olesen, Rita Henry, Max Cohn, Laurence Novelle, Rhonda West, and Mae Johnson had been unable to identify anyone in that spread of photographs;

7. Prior to executing said affidavit, Detective Overstrum was aware that Martin Olesen, Rita Henry, Max Cohn, Laurence Novelle, Rhonda West, and Mae Johnson had been unable to identify anyone in that spread of photographs;

8. If asked Overstrum would testify that in failing to include in his affidavit the fact of Martin Olesen's, Rita Henry's, Max Cohn's, Laurence Novelle's, Rhonda West's, and Mae Johnson's inability to make an identification, he did not intent to deceive or mislead the Judge to whom the affidavit was addressed, or anyone else, but that he consciously failed to include this information because he did not feel that it was relevant.

Entered into this 4th day of November, 1976.

THE DEFENDANT  
ARLO LEWIS

By

Richard S. Cramer  
Assistant Federal Public Defender

UNITED STATES OF AMERICA

PETER C. DORSEY

UNITED STATES ATTORNEY

By

THOMAS P. SMITH  
Assistant United States Attorney

By

ALBERT S. DABROWSKI

Assistant United States Attorney

App. 5c



UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA :

v. :

CRIMINAL NO. H-76-97

ARLO LEWIS :

RULING ON DEFENDANT'S PRE-TRIAL MOTIONS

The defendant, Arlo Lewis, has been indicted for bank robbery, 18 U.S.C. § 2113(a). He has made several pre-trial motions which are the subject of this opinion.\* The defendant has moved for release from custody pursuant to the Speedy Trial Act, 18 U.S.C. § 3164, and Section 10(a) of the Speedy Trial Plan for the District of Connecticut. A hearing was held on this motion on November 12, 1976. In addition, Lewis seeks to suppress three different statements made while he was in custody on the grounds that they were obtained in violation of the rights afforded him by the fourth, fifth, and fourteenth amendments and 18 U.S.C. § 3501. Hearings were held on this motion on November 2, 1976 and November 4, 1976.<sup>1/</sup>

\*

The rulings on these pre-trial motions were made in open court on December 9, 1976.

<sup>1/</sup>

The defendant has also moved to suppress any evidence concerning photographic identifications. The defendant has not briefed this claim and apparently has abandoned it. In any event, nothing in the record supports his claim that the photographic spread was impermissibly suggestive. Therefore, this motion is denied.



# I. Findings of Fact

On Saturday, July 10, 1976, two black males robbed the United Bank and Trust Company, Windsor, Connecticut. On July 16, 1976, a state warrant for the arrest of Arlo Lewis was issued upon the affidavit of Windsor, Connecticut police officer Everett Laurence Overstrom. The supporting affidavit states that Overstrom investigated the robbery with Special Agent Harry Willis of the Federal Bureau of Investigation. It further states that Overstrom and Willis showed a spread of photographs to bank manager Joseph R. Luppachino, Jr., who identified Arlo Lewis as one of the bank robbers. Overstrom's affidavit does not disclose that photographs also had been shown to six other persons who were unable to identify anyone in the spread as being one of the robbers.<sup>2/</sup>

On Saturday morning July 17, 1976, Windsor, Connecticut police officer Overstrom, Hartford officer Madison Bolden, and F.B.I. Special Agents Willis and David Miller arrested Arlo Lewis in his Hartford apartment, pursuant to the state arrest warrant. At that time, Lewis was orally given Miranda warnings, first by Overstrom and shortly thereafter by Special Agent Miller. Lewis said nothing in response to these warnings. On July 16, 1976, the night before the arrest, Lewis had been stabbed by his girlfriend during an argument. He

2/

A stipulation was entered into by the parties concerning the facts surrounding Detective Overstrom's affidavit. Defendant's Exhibit 8. The arrest warrant and the supporting affidavit are Defendant's Exhibit 5.



received a wound the size of one centimeter in his chest. In addition, Lewis, 24 years old, has been a heroin addict for 11 years. He had not injected any drugs into his system on July 16. However, at the time of his arrest on July 17, he made no request for medical assistance.

Following his arrest, Lewis was taken by the state officers and F.B.I. agents from his Hartford apartment to the Hartford police station. At 9:41 a.m., in the "interrogation room" of the station, he was again given Miranda warnings by F.B.I. Agent Willis. At 9:44 a.m., Lewis executed an "Interrogation Advice of Rights Form," acknowledging that he understood his rights.<sup>3/</sup> He stated that he "didn't want to say anything until [he] saw a lawyer."<sup>4/</sup> After his statement, Special Agent Willis asked him when he had last seen Wayne Brown, his alleged accomplice. Lewis responded that he had seen Brown on July 10, 1976, the day of the bank robbery. No further questions were asked of Lewis at that time. During this encounter, the defendant made no requests for medical assistance. Following the interview, he was placed in a cell in the "lockup" of the Hartford police station.

At 2:30 p.m. that same afternoon, Lewis was taken to the Hartford Hospital where his chest wound was treated. The

---

<sup>3/</sup> Government's Exhibit 3.

<sup>4/</sup> Transcript at 72.



- 4 -

hospital's records do not indicate that he showed symptoms of suffering from withdrawal and do not reflect any complaints in that regard by Lewis.<sup>5/</sup> At 3:30 p.m., he was returned to his cell in the "lockup" of the Hartford police station.

At approximately 5:30 p.m. that afternoon, Lewis initiated a conversation in the "lockup" area with Hartford police detective, Edgar Campbell, whom he knew from his neighborhood. Lewis began the conversation by asking Detective Campbell to give a message to his girlfriend. Campbell then asked Lewis what he was doing in the Hartford "lockup" and Lewis responded that he had been arrested for the Windsor bank robbery. During the course of the ensuing conversation, Campbell, who was not investigating the Windsor bank robbery, said that he had seen "a beautiful photograph of the bank holdup"<sup>6/</sup> and that Windsor police officers had shown him a photograph of Lewis and said that they wanted him for the robbery. He urged Lewis to cooperate with the F.B.I. Lewis then admitted his participation in the bank robbery. At no time did Campbell give Lewis Miranda warnings. The conversation with Campbell concluded at approximately 6:15 p.m.

At the end of the conversation with Campbell, Lewis asked him to inform F.B.I. Agent Willis that he wanted to

---

<sup>5/</sup>  
Transcript at 117-19.

<sup>6/</sup>  
Transcript at 199.



speak to him. Campbell was reluctant to call Special Agent Willis at home on a Saturday night, but he contacted the Windsor police who in turn contacted Special Agent Miller (not being able to reach Willis).

At 7:55 p.m., prior to Special Agent Miller's arrival, the doctor for the Hartford Police Department treated Lewis. The doctor gave him 20 milligrams of methadone. This is the doctor's usual treatment for narcotic addicts. His records do not reflect that Lewis was in extreme pain or in an advanced stage of withdrawal.<sup>7/</sup>

At 8:20 p.m., Special Agent Miller arrived and advised the defendant of his rights. At 8:30 p.m., Lewis executed a second "Interrogation Advice of Rights Form."<sup>8/</sup> During that 10-minute period, Special Agent Miller discussed the form with Lewis. In view of Lewis' earlier desire to consult with counsel, Miller wanted to assure himself that "Lewis realized exactly what he was doing."<sup>9/</sup> Having noticed a hospital identification tag on Lewis' wrist, Miller inquired as to his physical condition. Based upon this discussion with Lewis, Miller concluded that the defendant was in full possession of his faculties.

---

<sup>7/</sup> Defendant's Exhibits 2 and 3; transcript at 39-40.

<sup>8/</sup> Government's Exhibit D.

<sup>9/</sup> Transcript at 227.



Following the execution of the "Interrogation Advice of Rights Form," Lewis confessed to Miller about his participation in the bank robbery. These statements were transcribed, and, after reading them, Lewis signed them at 10:05 p.m.<sup>10/</sup>

## II. Motion for Release From Custody

The defendant has moved for release from custody pending trial, pursuant to the Speedy Trial Act, 18 U.S.C. § 3164(b)<sup>11/</sup> and Section 10(a)<sup>12/</sup> of the Speedy Trial Plan for the District of Connecticut.<sup>13/</sup> These provisions require that an accused

<sup>10/</sup>  
Government's Exhibits E and F.

<sup>11/</sup>  
18 U.S.C. § 3164(b) provides:

"During the period such plan is in effect, the trial of any person who falls within subsection (a)(1) or (a)(2) of this section shall commence no later than ninety days following the beginning of such continuous detention or designation of high risk by the attorney for the Government. The trial of any person so detained or designated as being of high risk on or before the first day of the interim period shall commence no later than ninety days following the first day of the interim period.

<sup>12/</sup>  
Section 10(a) of the Local Plan provides:

"A defendant in custody whose trial has not commenced within the time limit set forth in 18 U.S.C. § 3164(b) shall, if the failure to commence trial was through no fault of the defendant or his counsel, be released subject to such conditions as the court may impose in accordance with 18 U.S.C. § 3146. Nothing herein shall require that a defendant in custody be released except as required by 18 U.S.C. § 3164(c)."

<sup>13/</sup>  
I denied this motion in open court on November 12, 1976. The present discussion is aimed at clarifying the basis for that ruling.



be released from federal custody if he has been in continuous detention for 90 days without being tried. The defendant was arrested pursuant to a state warrant on July 17, 1976, and has remained in custody since that date. While he was not indicted and charged with a federal crime until September 17, 1976, and was not formally in federal custody until that date, the defendant argues that the 90-day period began on July 30, 1976, when the Assistant United States Attorney received the F.B.I.'s investigation report of this case.

The basis of the defendant's argument is that :

"[t]he state arrest and detention [for the state crime of robbery in the first degree] serve only as a 'holding action' for the contemplated federal prosecution." <sup>14/</sup>

He contends that the 90-day limit on detention awaiting federal trial will be circumvented unless the time he spent in state custody is credited.

There is considerable merit to defendant's position. The federal authorities played a significant role in the state arrest and incarceration of the defendant. As Detective Overstrom's affidavit itself states, the F.B.I. and Windsor police jointly investigated the bank robbery.<sup>15/</sup> Furthermore, the state arrest warrant was executed jointly by state and

<sup>14/</sup>

Defendant's Memorandum in Support of Motion to Release, November 2, 1976, at 2.

<sup>15/</sup>

Defendant's Exhibit 5, Overstrom affidavit ¶ 3.

federal officers and the F.B.I. assisted in transporting the defendant to the Hartford police station. Finally, the F.B.I. conducted the interrogation of the defendant while he was in custody at the Hartford police station. All of this indicates that the state detention may well have served as a "holding action" while the federal prosecutor prepared to present his case to the grand jury and for the subsequent trial. However, while there is merit to the defendant's claim that the 90-day period should include the time spent in state custody, I need not decide that issue at this time, for even as so calculated the 90-day period has not yet expired.

Title 18, U.S.C. § 3161 establishes the time limits within which various stages of the criminal process must be completed. For example, § 3161(g) requires that a trial take place within 180 days of arraignment. These provisions are designed to insure the speedy trial and disposition of federal criminal cases. However, recognizing that certain delays are justifiable, 18 U.S.C. § 3161(h) delineates the categories of delay which are excludable time for purposes of computing the various time limits of § 3161. Thus, 18 U.S.C. § 3161(h)(1)(E) excludes delay resulting from hearings on pre-trial motions and 18 U.S.C. § 3161(h)(1)(G) excludes "delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement."



Title 18, U.S.C. § 3164 is directed to a slightly different aspect of the speedy trial problem. It seeks to prevent a defendant from remaining in custody for an extended period of time while awaiting a trial. Section 3164(b) places the limit at 90 days, beyond which the defendant must be released from custody pending trial. However, § 3164(c) recognizes that if failure to commence trial is through the fault of the accused or his counsel, the 90-day limit may be extended.

The question presented here is whether the categories of excludable time outlined in 18 U.S.C. § 3161(h) are also applicable to the computation of the 90-day detention limit of 18 U.S.C. § 3164. This issue has not been resolved finally by the Second Circuit. However, in United States v. Martinez, 538 F.2d 921 (2d Cir. 1976), aff'g United States v. Mejias, 417 F. Supp. 579 (S.D.N.Y. 1976), the court had before it a decision of Judge Carter of the Southern District of New York which found the § 3161(h) exceptions applicable to § 3164's time period. United States v. Mejias, supra, 417 F. Supp. at 582-84. While the Second Circuit panel articulated an independent basis for affirming Judge Carter's decision, it found his analysis of the present problem "quite persuasive." United States v. Martinez, supra at 924. I also find that analysis persuasive and, thus, I hold that the excludable time provisions of § 3161(h) apply to the computation of the 90-day period of § 3164.

The present motions to suppress were filed on October 8, 1976. The mere filing of motions does not toll the 90-day period. Hearings on these motions were calendared for October 18, 1976; but at the request of defense counsel and for good cause, the hearings were postponed until November 2, 1976. Because this delay stemmed from a request of defense counsel, this period is excludable under § 3164(c). Hearings were held on the motions to suppress on November 2, 1976 and November 4, 1976. A hearing was held on November 12, 1976, to hear evidence on this motion for release. These actual hearing days are excluded by § 3161(h)(1)(E). I took the motions to suppress under advisement on November 4, 1976. Thus, the 30-day period immediately following November 4, is excluded by § 3161(h)(1)(G). Consequently, the 90-day period has been tolled since October 18, 1976. As a result, even if the 90-day period began to run on July 30, 1976, as the defendant asserts, it has not yet expired. For this reason, I deny defendant's motion for release from custody.

### III. Motion to Suppress

The defendant made three different incriminating statements while he was in custody at the Hartford police station. He is now seeking to suppress these statements. Lewis makes two arguments in support of his motion to suppress. First, he argues that his arrest was illegal and that the statements are the fruit of that illegality and hence inadmissible. Wong Sun v. United States, 371 U.S. 471 (1963). Secondly, he



argues that these statements were procured in violation of his constitutional rights because they were given involuntarily and in violation of the procedures established in Miranda v. Arizona, 384 U.S. 436 (1966). The remainder of this opinion analyzes these claims.

A. Legality of Arrest

Lewis was arrested pursuant to a state arrest warrant. The warrant was issued on the basis of an affidavit sworn by Windsor police detective Overstrom. The defendant argues that this affidavit, on its face, is insufficient to establish probable cause. Alternatively, Lewis contends that "intentional and material omissions" from the affidavit render it insufficient to support the arrest warrant. Ultimately, the claim is that the three statements were the product of an illegal arrest and, therefore, are inadmissible.

1. The Facial Validity of the Affidavit

In his affidavit, Detective Overstrom states that the bank was robbed on July 10, 1976, by two black males. He then states that joint investigation by the Windsor police and the F.B.I. led to the arrest of Wayne Brown. The next paragraph states that "a confidential informer, a known associate of Wayne Brown," <sup>16/</sup> was told by Wayne Brown that he had robbed the bank. The informant also said that the other

<sup>16/</sup>  
Defendant's Exhibit 5, Overstrom affidavit ¶ 4.



robber was named "Arlo." The affidavit then says that further investigation revealed that the "Arlo" referred to was Arlo Lewis. The affidavit states that Lewis fit the police's general description of the second robber and that he was a known associate of Wayne Brown. The final paragraph of the affidavit reveals that Overstrom and F.B.I. Agent Willis showed a spread of photographs to Joseph R. Luppachino, Jr., the bank manager, who was present during the robbery and that he identified a photograph of Arlo Lewis as being one of the robbers.

The defendant's claim that this affidavit does not establish probable cause is without merit. "In dealing with probable cause . . . , as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Brinegar v. United States, 338 U.S. 160, 175 (1949). Reading the affidavit in a "commonsense way rather than technically," it states ample information to establish probable cause. United States v. Ventresca, 380 U.S. 102, 109 (1965)..

The affidavit does rely in part upon the hearsay statements of an unnamed informant. While this information standing alone might not be sufficient to establish probable cause under the standards of Aguilar v. Texas, 378 U.S. 108 (1964), the affidavit provides sufficient corroborating information to support its reliability. Spinelli v. United States, 393



U.S. 410 (1969). In addition to learning that the "Arlo" referred to by the informant was Arlo Lewis, the police ascertained that he fit the general description of the second bank robber. More importantly, the officer stated that bank manager Luppachino identified the photograph of Lewis as one of the robbers. Indeed, this identification by a witness to the crime may in and of itself be sufficient to establish probable cause. United States v. Smith, 467 F.2d 283 (9th Cir. 1972) (per curiam), cert. denied, 410 U.S. 912 (1973). Therefore, the defendant's challenge to the facial validity of the affidavit fails.

## 2. Omissions from the Affidavit

Prior to obtaining a state warrant to arrest the defendant, Windsor police detective Overstrom displayed a spread of seven photographs, one of which was of Arlo Lewis, to two employees of the bank and three customers of the bank, all of whom were in the bank at the time of the robbery. In addition, Detective Overstrom showed the photographic spread to two other persons who saw two black males in the vicinity of the bank at relevant times. Of these seven persons, only the bank manager was able to make an identification; he identified the photograph of Arlo Lewis. Detective Overstrom included in his affidavit the fact that Luppachino had made an identification of Arlo Lewis. However, he failed to include that six other persons had been unable to make an identification. The defendant argues that this omission requires a finding that the affidavit and hence the arrest warrant were fatally defective.



In recent years, federal courts have permitted a defendant to delve below the surface of a facially sufficient supporting affidavit to test its accuracy.<sup>17/</sup> See, e.g., United States v. Carmichael, 489 F.2d 983 (7th Cir. 1973) (en banc). See generally, Kipperman, Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence, 84 Harv. L. Rev. 825 (1971). In most instances, the claim has been that the supporting affidavit contained a misrepresentation of fact. In those cases, the courts have established two general criteria for assessing the effect of a misrepresentation on the ensuing arrest or search. The first criterion looks to the culpability of the affiant. The inquiry is whether the misrepresentation resulted from a purposeful intent to deceive the issuing judicial officer or was merely an innocent or negligent mistake. The second criterion tests whether the misrepresentation was material to a finding of probable cause. The Second Circuit has held that the warrant is defective if the misrepresentation is either material or was purposefully intended to deceive the issuing judicial officer. United States v. Pond, 523 F.2d 210, 213 (2d Cir. 1975), cert. denied, 423 U.S. 1058 (1976); United States v. Gonzalez, 488 F.2d 833, 837 (2d Cir. 1973). Accord, United States v. Thomas, 489

<sup>17/</sup>

Because the defendant and the Government entered into a stipulation, there is no need to decide whether the defendant's assertions would be sufficient to require an evidentiary hearing. See, United States v. Carmichael, 489 F.2d 983, 988 (7th Cir. 1973) (en banc).



F.2d 664, 669 (5th Cir. 1974); United States v. Marihart, 492 F.2d 897 (8th Cir.), cert. denied, 419 U.S. 827 (1974). While the present concern is with an omission from an affidavit rather than the inclusion of a misrepresentation, I find the same criteria are applicable. Morris v. Superior Court, 57 Cal. App.3d 521 (1976).

Detective Overstrom "did not intend to deceive or mislead the Judge to whom the affidavit was addressed, or anyone else, [rather] he consciously failed to include this information because he did not feel it was relevant."<sup>18/</sup> Thus, Detective Overstrom was at most negligent in failing to include in his affidavit the inability of others to make an identification.<sup>19/</sup> For this reason, there is no basis for finding the affidavit defective on the grounds of the culpability of the affiant. United States v. Pond, supra, 523 F.2d at 214; United States v. Gonzalez, supra, 488 F.2d at 838.

<sup>18/</sup>

Defendant's Exhibit 8, Overstrom affidavit ¶ 8.

<sup>19/</sup>

In assessing the propriety of Overstrom's conduct, it is important to keep the following in mind:

"That the strengths and weaknesses of the government's case were not all set forth in the affidavits does not appear to be reason enough to invalidate the search warrants. If this were the case, most affidavits would be lengthy briefs, carefully arguing the inferences to be drawn from every fact presented."

United States v. Averell, 296 F. Supp. 1004, 1018 (E.D.N.Y. 1969).



The remaining question is whether the omitted information was material to the finding of probable cause. In cases dealing with the inclusion of misrepresentations in the affidavit, the courts have tested the materiality of the inaccuracy by ascertaining whether probable cause exists with the erroneous statement deleted. United States v. Gonzalez, supra, 488 F.2d at 838. Therefore, the appropriate test here is whether the addition to the affidavit of the omitted material vitiates the finding of probable cause. Morris v. Superior Court, supra at 241. I find that it does not.

There is no doubt that the identification of bank manager Luppachino was an important element in establishing probable cause for the arrest of Arlo Lewis. Furthermore, the failure of other eyewitnesses to make an identification from the same photographic spread is relevant to the accuracy of that identification and would be admissible at trial. Nevertheless, the omitted information does not sufficiently diminish the force of Luppachino's identification to negate probable cause.

As noted above, the significant weight to be given to an eyewitness identification is revealed by the fact that a single identification by an eyewitness may in and of itself support a finding of probable cause. For example, in United States v. Smith, supra, the Ninth Circuit affirmed a finding of probable cause solely upon the basis of a bank manager's photographic identification of a robber. In the present case,



the identification is supplemented by other evidence and there is no challenge to the bank manager's credibility. Also, the other persons did not make a contrary identification. They were merely unable to make an identification. Finally, it must be emphasized that the concern here is with probable cause not with proof beyond a reasonable doubt. As Judge Judd stated in United States v. Averell, 296 F. Supp. 1004, 1018 (E.D.N.Y. 1969), when confronted with a similar omission from an affidavit in support of a search warrant:

"In evaluating the [materiality of omitted] facts it is important to be mindful of the difference between the probable cause necessary to support a[n] [arrest] warrant and the strict proof necessary to support a jury verdict."

Accord, Spinelli v. United States, supra, 393 U.S. at 419. With this distinction in mind, I find the omitted information does not render the supporting affidavit and the arrest warrant defective.

The arrest of Arlo Lewis was supported by probable cause and hence was consistent with the requirements of the fourth and fourteenth amendments. Therefore, defendant's effort to suppress the three statements as fruits of an illegal arrest is rejected.

#### B. Voluntariness of the Statements

The defendant made three incriminating statements on Saturday, July 17, 1976, the day of his arrest. The first one



occurred on Saturday morning at the Hartford police station when he indicated that he had last seen Wayne Brown, his alleged accomplice, on the day of the robbery. The second statement was made to Detective Campbell in the "lockup" area late Saturday afternoon. The third statement was the written confession given to Agent Miller on Saturday evening.

Lewis argues that each of these statements must be suppressed because they were involuntary. The defendant asserts two interrelated bases for this claim. The first is that each statement was procured in violation of the procedures outlined in Miranda v. Arizona, supra. The second basis is that apart from Miranda the statements were involuntary because the defendant's physical condition precluded him from making a knowing and intelligent waiver of his constitutional rights.

In Miranda v. Arizona, the Court held that:

"a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."

384 U.S. at 475. Leaving Miranda to one side, it is now settled that a confession which is challenged on constitutional grounds is admissible if the court is satisfied by a preponderance of the evidence that the legal requirements for admission have been met. It is not necessary to establish the admissibility beyond a reasonable doubt. Lego v. Twomey, 404 U.S. 474 (1972); United States v. Wedra, 343 F. Supp. 1183,



1185 (S.D.N.Y. 1972). In assessing whether this burden has been met, the court must consider the "totality of the circumstances," Schneckloth v. Bustamonte, 412 U.S. 218, 223-27 (1973), including the "experience and conduct of the accused as well as the credibility of the police officer(s) testimony." Pettyjohn v. United States, 419 F.2d 651, 654 n.7 (D.C. Cir.), cert. denied, 397 U.S. 1058 (1969). With these principles in mind, I now consider the defendant's claims with respect to each of these statements.

1. Statement to Agent Willis on Saturday Morning

The record reveals that at the time of his arrest at his Hartford apartment on Saturday morning July 17, Arlo Lewis was twice given Miranda warnings.<sup>20/</sup> He made no statement in response to those warnings. The defendant was then taken to the Hartford police station where the warnings were again given at 9:41 a.m. At 9:44 a.m., Lewis signed an "Interrogation and Advice of Rights Form," acknowledging that he understood the warnings. There is no dispute that in response to those warnings Lewis said that he "didn't want to say anything until [he] saw a lawyer."<sup>21/</sup> After that statement, Special Agent Willis asked him when he had last seen Wayne Brown, his alleged accomplice. In response to that question, Lewis said

<sup>20/</sup>  
Transcript at 140, 219-220.

<sup>21/</sup>  
Transcript at 72, 141.



that he had seen him on the day of the robbery.<sup>22/</sup> The defendant seeks to suppress this statement.

The statement concerning Wayne Brown was made in response to Special Agent Willis' question and after Lewis stated that he wanted to consult with an attorney. While it is an open question whether an accused who indicates a desire to consult with counsel can later change his mind following new warnings, see infra Part II B 3, it is certain that interrogation cannot continue at the time he first makes the statement. Miranda v. Arizona, supra at 474; cf. United States v. Collins, 462 F.2d 792, 801-02 (2d Cir. 1972) (en banc). Therefore, the defendant's statement concerning Wayne Brown was procured in violation of Miranda's procedures and must be suppressed.

2. Statements made to Detective Campbell on Saturday Afternoon

At approximately 5:30 p.m. on Saturday July 17, Hartford police detective Edgar Campbell and the defendant Arlo Lewis had a conversation in the "lockup" of the Hartford police station. During the course of that conversation, Lewis admitted his participation in the Windsor bank robbery. The defendant seeks to suppress these statements claiming they

22/

There is conflicting testimony as to whether this question was asked and answered before or after Lewis indicated that he wished to speak to counsel. However, the conflict is in the statements of two F.B.I. agents. Transcript at 152, 223. Therefore, I must conclude that the Government has not met its burden in this regard.



were the product of custodial interrogation and procured in violation of Miranda because no warnings were given. The Government counters that they were spontaneously volunteered by the defendant and hence not subject to the requirements of Miranda.

I have heard two versions of what happened during the course of the conversation between Lewis and Campbell. Based on all the testimony and my assessment of the circumstances surrounding the conversation, I believe the following relevant facts occurred. Lewis initiated the conversation by asking Campbell to give a message to his girlfriend. Campbell then asked the defendant what he was doing in the "lockup." Lewis responded that he had been arrested for the Windsor bank robbery. Before Lewis made any incriminating statements, Campbell, who was not investigating the Windsor bank robbery (being a Hartford police officer), said that he had seen "a beautiful photograph of the hold-up" and that Windsor police officers had shown him a picture of Lewis and said they wanted him for the robbery.<sup>23/</sup> He also encouraged Lewis to cooperate with the F.B.I. The defendant then confessed to his participation in the robbery. Campbell took no notes of the conversation. He, at no time, gave the defendant Miranda warnings.

The Miranda requirements are triggered by "custodial interrogation." The defendant was in custody at the time of

this conversation. Cf. Beckwith v. United States, 44 U.S.L.W. 4499 (U.S. April 21, 1976). Thus, the only question here is whether the statements were given in response to interrogation by Detective Campbell. In Miranda, the Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody." Miranda v. Arizona, supra, 384 U.S. 444. However, because interrogation is not always pre-arranged or planned, and officers use a variety of techniques to elicit information, the content of "interrogation" must be defined on a case-by-case basis. United States v. Charles, 371 F. Supp. 204, 208 (E.D.N.Y. 1973), aff'd, 490 F.2d 1406 (2d Cir. 1974). In this regard, a useful standard is whether the police conduct was "expected to, or likely to, evoke admissions." Santos v. Bayley, 400 F. Supp. 784, 795 (M.D. Pa. 1975), quoting Commonwealth v. Simala, 434 Pa. 219, 226 (1969). Cf. United States v. Vasquez, 476 F.2d 730 (5th Cir.), cert. denied, 414 U.S. 836 (1973). Applying that test here, I find that Lewis' statements to Campbell were the product of interrogation.

The Government emphasizes that Lewis initiated the conversation with Campbell. However, by initiating a conversation unrelated to the crime itself, an accused does not open the door for a discussion about his participation in the crime. Lewis merely asked Campbell to do a favor for him. It was Campbell who directed the conversation to the subject of the bank robbery by asking what Lewis was doing in the



- 23 -

"lockup." Furthermore, as detailed below, he prodded Lewis' statements with additional remarks concerning the robbery. Cf. Santos v. Bayley, supra, 400 F. Supp. at 795. Thus, this is not a case where an accused spontaneously volunteers incriminating information as in United States v. Gaynor, 472 F.2d 899 (2d Cir. 1973) (per curiam). See also, United States v. Nussen, 531 F.2d 15, 21 (2d Cir. 1976).

In asserting that there was no interrogation, the Government also stresses that Campbell, a Hartford police officer, was not investigating the Windsor bank robbery, as evidenced by the fact that he did not take notes of the conversation. However, he was aware of the robbery. Indeed, he told Lewis that he had seen a "beautiful photograph of the hold-up" and that he was shown a picture of Lewis by the Windsor police who told him that they wanted Lewis for the robbery. In addition, Campbell encouraged Lewis to cooperate with the authorities. While his conduct was not particularly overbearing, Campbell's remarks were likely to, and did in fact, evoke incriminating statements from Lewis.<sup>24/</sup> Therefore, I find that Lewis' admissions to Campbell were the product of interrogation and that the requirements of Miranda were

---

<sup>24/</sup> This is not a case where the questioning was unrelated to the crime, nor was it merely an effort to procure basic biographical information from the defendant. United States ex rel. Hines v. LaVallee, 521 F.2d 1109 (2d Cir. 1975), cert. denied, U.S.  (1976). Detective Campbell's conduct was similar to a technique of interrogation described in Miranda v. Arizona, 384 U.S. 436, 450 (1966).

applicable. After the earlier warnings, Lewis had stated that he wanted to consult with counsel and had chosen to remain silent. Thus, Campbell could not interrogate him without at the very least giving renewed warnings. Collins v. United States, supra. Campbell did not give these warnings, and hence these statements must be suppressed.

3. Statements made to Special Agent Miller on Saturday Evening

At the conclusion of the conversation with Detective Campbell, Lewis asked him to contact Special Agent Willis. Campbell was reluctant to contact the agent at his home on a Saturday night. However, after Lewis assured Campbell that he was sincere in his desire to speak to the F.B.I., Campbell contacted the Windsor police. They in turn contacted Special Agent Miller (not being able to contact Willis), and he arrived at the Hartford police station at 8:20 p.m. Upon his arrival, Special Agent Miller advised Lewis of his rights. At 8:30 p.m., Lewis signed an "Interrogation Advice of Rights Form," acknowledging that he understood his rights.<sup>25/</sup> During that 10-minute period, Special Agent Miller discussed those rights with Lewis. In view of the defendant's earlier desire to consult with counsel, Miller wanted to assure himself that "Lewis realized exactly what he was doing."<sup>26/</sup> Miller also

<sup>25/</sup> Government's Exhibit D.

<sup>26/</sup> Transcript at 227.



noticed a hospital identification tag on Lewis' wrist, and thus inquired as to his physical condition. Based upon these inquiries, Special Agent Miller was satisfied that the defendant was in full possession of his faculties.

Following this inquiry and Lewis' execution of the form, Miller questioned him about the robbery. The defendant confessed to his participation in the crime. His confession was transcribed, and Lewis signed a written statement at 10:05 p.m. The defendant now seeks to suppress these statements, claiming that they were procured in violation of his rights.

In determining the admissibility of these statements, the initial question is whether Lewis' earlier desire to consult with counsel before speaking with the F.B.I. precludes a waiver of that right at a later time. In Miranda v. Arizona, the Court stated:

"Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present."

384 U.S. at 473-74. Since Miranda, courts have struggled with whether these remarks were intended to create a per se rule preventing renewed interrogation after an accused's assertion of his right to remain silent or to consult with counsel. See, e.g., United States v. Collins, supra. The defendant argues for such a per se rule with respect to the assertion of a



desire to consult with counsel. However, the notion that an accused's earlier asserted right to remain silent may never be waived was rejected in Michigan v. Mosley, 423 U.S. 96 (1975).

In Michigan v. Mosley, the Court considered the propriety of renewed interrogation after an accused has indicated a desire to remain silent. The Court held that Miranda did not create a per se rule and, therefore, an accused could change his mind and waive his initially asserted right to remain silent. In Mosley, the Court did not consider whether a similar possibility for waiver exists after an accused has once indicated a desire to consult with counsel;<sup>27/</sup> but the Court's rationale is instructive. In rejecting a literal reading of the above-quoted passage in Miranda, the Court stated:

"[A] blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the Miranda safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests."

<sup>27/</sup>

I should note that the defendant's position derives support from a statement of Justice White in his concurring opinion in Michigan v. Mosley, 423 U.S. 96, 107, 109-110 (1975), where he suggests that the Miranda Court did believe that an accused who initially indicates a desire for counsel could not later waive that right. A divided panel of the Ninth Circuit recently relied upon this statement in holding that Miranda created a per se rule. United States v. Flores-Calvillo, Docket No. 75-3785 (July 14, 1976) pending petition for rehearing en banc. However, in light of the majority's opinion in Mosley, I disagree.



423 U.S. at 102. This argument against a per se rule is equally applicable in the present context.

While I reject a per se rule, I do recognize that there are differences between an accused's assertion of a right to remain silent and an assertion of a desire to consult with counsel. An indication of a desire to consult with counsel does reveal that the accused feels somewhat incompetent to deal with the police without prior legal advice. However, this fact does not require a per se preclusion of renewed interrogation, but rather necessitates a more careful scrutiny of the individual's later choice to waive his rights and speak to the authorities.<sup>28/</sup> This approach has been adopted by other courts, see, e.g., United States v. Cavallino, 498 F.2d 1200, 1202-03 (5th Cir. 1974), and is, I believe, wholly consistent with the primary goal of Miranda to insure that waivers of constitutional rights are made "voluntarily, knowingly and intelligently." 484 U.S. at 444.

The remaining question, therefore, is whether the defendant's decision to give a statement to Special Agent

<sup>28/</sup>

In a footnote in Michigan v. Mosley, Justice White makes a similar point:

"[T]he accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism."

423 U.S. at 110 n.2.



Miller was made "voluntarily, knowingly, and intelligently."  
Cf. United States v. Satterfield, Docket No. 76-1372 (2d Cir. 1976) (waiver of sixth amendment rights after indictment).  
The defendant claims that his decision was tainted by the fact that he let the "cat out of the bag" by confessing to Detective Campbell, following illegal interrogation. However, the Second Circuit has recently held that "letting the cat out of the bag" during illegal interrogation does not require an automatic finding of involuntariness with respect to later statements. Tanner v. Vincent, 541 F.2d 932, 936-37 (2d Cir. 1976). It is at most one factor in assessing voluntariness. Cf. United States ex rel. Stephen J.B. v. Shelly, 430 F.2d 215 (2d Cir. 1970). In the present case this factor is outweighed by other factors which indicate to me that Lewis' decision to speak to Miller was voluntary.<sup>29/</sup> Cf. United States v. Bayer, 331 U.S. 532, 540 (1947); Tanner v. Vincent, supra.

At the conclusion of his conversation with Campbell, Lewis asked to speak to the F.B.I. Indeed, when Detective Campbell indicated reluctance to contact the agent on a

29/

I accord little weight to the fact that Lewis had already confessed to Campbell. I do not believe Lewis' statements to Miller were motivated or caused by the earlier confession. Lewis' testimony to this effect is, in my opinion, an after-thought and not credible. Transcript at 90. My belief is that he chose to speak to Miller because he felt it was in his best interest to do so. His confession to Miller, therefore, was not tainted by anything that occurred during his conversation with Campbell.



Saturday night, Lewis persuaded him to do so.<sup>30/</sup> Two hours passed before Special Agent Miller arrived. This was sufficient time for Lewis to reconsider his decision to talk. Furthermore, and most importantly, Lewis confessed only after he was fully informed of his rights for the fourth time that day. He was then entirely free to evaluate the situation and consider whether he wanted to talk. Indeed, Agent Miller, aware that Lewis had earlier wanted to consult with counsel, took special care in advising him of his rights in order to assure himself that the defendant "knew exactly what he was doing." Special Agent Miller also inquired about the defendant's physical condition. Based upon that inquiry, he became convinced that Lewis was in full possession of his faculties. I also find that the defendant's physical condition did not impede his judgment.<sup>31/</sup> Fully cognizant of the special

---

<sup>30/</sup> This point should not be overemphasized. Campbell did encourage Lewis to cooperate with the authorities. Nevertheless, his insistence on speaking to the F.B.I. on Saturday night reflects in my mind the voluntariness of his actions.

<sup>31/</sup> The defendant made no medical requests of any of the officers to whom he spoke during the day. He had been treated in the afternoon at the Hartford Hospital for a small knife wound. At that time, he did not complain of narcotics withdrawal. Transcript at 116-17. Finally, he had been treated by the Hartford police's doctor a half-hour before he spoke to Agent Miller and the doctor did not find that he was suffering from an advanced stage of withdrawal. In any event, he had been treated before he spoke to Special Agent Miller. The defendant's expert testified that this treatment would provide comfort within a short period of time. Transcript at 260. Thus, the defendant's claim that his judgment was impaired is not supported by the evidence. Nor does the record support his claim that he confessed in return for a promise of medical treatment.



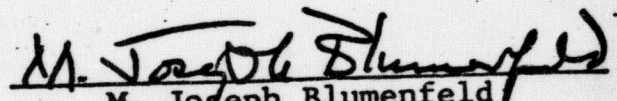
scrutiny that must be paid to Lewis' decision to change his mind and the "heavy burden" which rests upon the Government, I find that the defendant's decision was made "voluntarily, knowingly and intelligently." Cf. United States v. Duvall, 537 F.2d 15 (2d Cir. 1976).<sup>32/</sup> As such, the oral and written confessions given to Special Agent Miller are fully admissible.

#### IV. Conclusion

Defendant's motion for release from custody pending trial pursuant to 18 U.S.C. § 3164 of the Speedy Trial Act and Section 10(a) of the Speedy Trial Plan for the District of Connecticut is denied. Defendant's motion to suppress statements he made while he was in custody is granted in part and denied in part. The statement made to Special Agent Willis and the statements to Detective Campbell are inadmissible because they were elicited in violation of the procedures outlined in Miranda v. Arizona, supra. The oral and written confession given to Special Agent Miller is fully admissible.

It is SO ORDERED.

Dated at Hartford, Connecticut, this 3<sup>rd</sup> day of January, 1977.

  
M. Joseph Blumenfeld  
United States District Judge

<sup>32/</sup>

The defendant has also challenged the admissibility of the confession under 18 U.S.C. § 3501. My assessment of the factors outlined in § 3501(b) leads to the conclusion that the confession is admissible under that statute. United States v. Barry, 518 F.2d 342 (2d Cir. 1975).



ARREST WARRANT APPLICATION  
CF 129 12-63

STATE OF CONNECTICUT  
CIRCUIT COURT

BEST COPY AVAILABLE

NAME AND RESIDENCE (Town) OF ACCUSED ARLO LEWIS 193 Sigourney St., Hartford, Conn.	COURT TO BE HELD AT (Town) WINDSOR	CIRCUIT IN 13
---	---------------------------------------	------------------

APPLICATION FOR ARREST WARRANT

TO: A Judge of the Circuit Court.

The undersigned hereby applies for a warrant for the arrest of the above named accused on the basis of the facts set forth in the ... ☒ affidavit below ... ☐ affidavit(s) attached.

DATE & SIGNATURE	DATE July 16, 1976	SIGNED (Assistant Prosecuting Attorney) <i>[Signature]</i> AFFIDAVIT
------------------	-----------------------	--

The undersigned, being duly sworn, deposes and says: That this affiant is a police officer in the Windsor Police Department assigned to the Detective Division and have been a member of the Windsor Police Department for the past ten years and have investigated numerous robberies which have resulted in arrest and convictions do hereby state the following:

On July 10, 1976, at 11:00AM a bank robbery alarm was received at the Windsor Police Department from the United Bank & Trust Company located in the Windsor shopping center, Windsor Ave., Windsor, Conn.

Investigation by the first Windsor Police Officers at the scene revealed that two black males had just held up the bank: one being armed with a snub nosed revolver. The descriptions of the subjects are as follows:

Subject #1: Black male, 5'7", mid twenties, 140 lbs., mustache, slim build, wearing a blue denim hat and dark sunglasses.

Subject #2: Black male, 5'6", 140 lbs., slim build, wearing a purple patterned shirt, medium Afro.

Subject #1 walked into the United Bank carrying a black briefcase and took out a revolver from the briefcase and informed them that this was a hold up. Subject #2 went behind the teller's counter and took \$2,147.09. The subjects then left the bank by the front door and ran towards the rear of the bank building,

Investigation by this affiant and a special agent, Harry Willis of the Hartford office of the Federal Bureau of Investigation led to an arrest warrant being issued for the arrest of Wayne X. Brown of 9 Clinton St., Hartford, Conn. for Robbery in the first degree and larceny in the first degree of the United Bank and Trust Company on July 10, 1976. Wayne Brown is subject no. 1 as described above.

A confidential informer, a known associate of Wayne Brown informed the above affiant and agent Willis that he had talked with Wayne Brown on July 10, 1976 in the late evening hours and that Wayne Brown had admitted to him that he had pulled an armed hold up earlier in the day. The confidential informer also stated that the

DATE & SIGNATURE	DATE 7/16/76	SIGNED (Affiant) <i>[Signature]</i>	SIGNED (Judge or Clerk or Court Commissioner) <i>[Signature]</i>
JURAT	Subscribed and sworn to before me this 16 <sup>th</sup> day of July 1976		

FINDING

The foregoing Application for an arrest warrant, and affidavit(s) referred to in said Application, having been submitted to and considered by the undersigned, the undersigned finds from said affidavit(s) that probable cause exists in the above named accused.



# WARRANT APPLICATION

## STATE OF CONNECTICUT CIRCUIT COURT

AND RESIDENCE (Town) OF ACCUSED

ARLO LEWIS

193 Sigourney St., Hartford, Conn.

APPLICATION FOR ARREST WARRANT

COURT TO BE HELD AT (Town)

WINDSOR

CIRCUIT NO.

13

TO: A Judge of the Circuit Court.

The undersigned hereby applies for a warrant for the arrest of the above named accused on the basis of the facts set forth in the ☒ affidavit below ☐ affidavit(s) attached.

DATE & NATURE

DATE

July 16, 1976

SIGNED (Assistant Prosecuting Attorney)

AFFIDAVIT

The undersigned, being duly sworn, deposes and says:

other subject involved in the hold up was a subject by the name of Arlo who is an associate of Wayne Brown. Further investigation by this affiant revealed that the name of the subject in question was a one Arlo Lewis of 193 Sigourney St., Hartford, Conn. During our investigation of Arlo Lewis it was found that this subject fit the physical description of subject #2 and he is a known associate of Wayne Brown.

On July 16, 1976, this affiant and agent Harry Willis showed a series of seven like police photographs to a one Joseph Lupacchino, manager of the United Bank and Trust Company, who was present during the armed robbery. Mr. Lupacchino identified the photograph of Arlo Lewis as one of the bank robbers being robber #2 that held him up on July 10, 1976.

Based on the above information, this officer feels that there is probable cause to believe that the above subject Arlo Lewis did in fact commit the crime of Robbery in the 1st degree, 53a-134 and Larceny in the 1st degree, Section no. 53a-124 of the Connecticut General Statutes.

DATE & SIGNATURE

DATE

7/16/76

SIGNED (Affiant)

Det. J. Overton

SIGNED (Judge or Clerk of Court, or Notary Public)

Det. Notary Public

JURAT.

Subscribed and sworn to before me this 16<sup>th</sup> day of July 1976


FINDING

The foregoing Application for an arrest warrant, and affidavit(s) referred to in said Application, having been submitted to and considered by the undersigned, the undersigned finds from said affidavit(s) that probable cause exists



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of Appellant Lewis' brief and appendix were hand-delivered to the Office of Thomas P. Smith, Esq., Assistant United States Attorney, 450 Main Street, Hartford, Connecticut 06103, this 24th day of February, 1977.

  
\_\_\_\_\_  
RICHARD S. CRAMER  
Assistant Federal Public Defender